

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 09 .02.2007

Coram

THE HONOURABLE MR.JUSTICE M.E.N.PATRUDU

W.P.No.34351 of 2003

1.S.Sundaram
2.V.Chidambaram
3.AL.N.Alagappan

...Petitioners

Vs.

1.ICICI Bank Limited rep. By its
Chairman and Managing Director,
Corporate Office, ICICI Bank Tower,
Bandra Kurla Complex,
Mumbai 400 051.

2.The Personnel Manager,
HR Department,
ICICI Bank Limited,
192, Anna Salai,
Chennai - 600 002.

...Respondents

WRIT PETITION filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Mandamus, directing the respondents to grant pension in accordance with the Regulation 36(2) read with Regulation 39 of the Bank of Madura Employees Pension Regulation, 1995 based on the 10 month average emoluments last drawn by the petitioners with attendant D.A. And arrears of commutation from the date of retirement of each of the petitioner's.

For Petitioner :Mr.Balan Harida

For R2 :Mr.AL.Somayaji, Senior Counsel
for M/s. Aiyar & Dolia

O R D E R

Whether a writ under Article 226 of the Constitution is maintainable against the private banker is the first and foremost issue to be decided in this case.

2.00 If the answer is yes then the merits and de-merits of the case is to be considered. If the answer is no, the writ petition is liable to be dismissed and the prayer of the petitioner is to be rejected.

3.00 Sri Balan Haridas, learned counsel appeared for the petitioner and Sri AL.Somayaji, learned senior counsel appeared for the second respondent. Both sides advanced forceful and useful arguments.

4.00 Before I proceed to discuss the various points raised by both sides, I may have to note the law on the subject and the legal principles merging there from since settled by the Apex Court in identical cases, then to apply the same in the facts and circumstances of this case, in order to ascertain the writ jurisdiction of this Court in a case of this nature.

4:01 However for the purpose of understanding it would be sufficient to refer the material facts which are almost admitted. The material facts are not in dispute.

5.00 The facts to the extent necessary are:

The banker is the respondent and it is ICICI Bank Limited. The petitioners are the employees of the Bank. The petitioners were originally employed with Bank of Madura and promoted as Officers and were working in the same capacity. The Bank of Madura introduced a Pension Scheme in the year 1995 and the petitioners opted for the same. As per Regulation 36 of the Bank of Madura Employees Pension Regulations, if an employee retiring in accordance with the provisions of the service rules or settlement, after completing a qualifying service of not less than 33 years, the amount of basic pension shall be calculated at 50% of average emoluments.

5:01. While so Bank of Madura Limited amalgamated with ICICI Bank in the year 2001. As per Clause 6 of the Scheme of Amalgamation, the existing privileges/service conditions enjoyed by the employees of Bank of Baroda will be protected under the Amalgamation Scheme. After the merger, the Officers' Association of which the petitioners are also members have entered into a new compensation structure and pursuant to the agreement dated 29.06.2001, all the officers started drawing new pay scale and it was specifically agreed that till such time the new scheme is made applicable on mutual acceptance, the existing scheme would continue. At this stage, it is necessary to clarify that the existing scheme means the scheme which was in existence with Bank of Madura Employees' Pension Regulations and the Memorandum of Settlement dated 27.10.1999.

5:02. The forceful contention of the learned counsel for the petitioners is that even as per the agreement under the Heading "Provident Fund/Pension Fund" it was specifically agreed that till such time new scheme is made applicable on mutual acceptance, the existing scheme would continue. It was never contemplated in the Agreement, dated 29.06.2001, which is a wage revision agreement that the pension will be paid based on the last drawn pay without applicable Dearness Allowance. It is also stated that as per clause 2(iii) of the Memorandum of Settlement

dated 27.10.1999, it is clarified that the pension amount shall be calculated based on the average emoluments i.e. the average of pay drawn by an employee during the last ten months of his service as per Regulation 39 and subsequent wage revisions has made it explicitly clear that the wage revision will be taken note of while granting pension to the retired employees.

5:03. The interesting and powerful contention of the respondent bank is that the pension scheme in the bank was introduced in the year 1995 by Bank of Madura and its basic pay including stagnation increments, if any and all other allowances ranked for Provident Fund in addition to Dearness Relief calculated up to Index No.1148 points in the All India Consumer Price Index and it is worked out as per the Industry Level agreement, dated 14.12.1999 between Indian Banks Association and the organizations of Bank Officers, which was given effect to in Bank of Madura, as per the decision of their Board dated 21.01.2000 and after merger with ICICI Bank on 10.03.200. As per the scheme of Amalgamation, the existing service conditions as applicable to the employees of Bank of Baroda will be allowed to continue in the following terms: "All the employees of the Transferor Bank in service on the effective date shall become the employees of the Transferee Bank on such date without any break or interruption of service and on emoluments which are not less favourable than those subsisting with reference to Transferor Bank as on the effective date."

5:04. It is also an admitted fact that after amalgamation, the respondent bank revised the compensation structure for the officers of the Transferor bank effective from 01.07.2001, in terms of agreement dated 29.06.2001 with the Officers' Association of the petitioners, where in it was agreed after negotiations that the erstwhile Officers of Bank of Madura would get monthly salary and Dearness Allowance would be merged in Basic Salary.

5:05. The contention of the respondents bank is that by virtue of the said agreement, the pay structure of the petitioners was revised with the conversion of the variable Dearness Allowance into Fixed Dearness Allowance of which 25% was merged with the basic pay and remaining 75% of the Fixed Dearness Allowances was to be merged with basic salary in 3 equal annual instalments on 01.07.2002, 01.07.2003, 01.07.2004.

5:06. It is further contended that in terms of another agreement dated 10.09.2002 with the said Association, the ICICI Bank merged the balance Fixed Dearness Allowance with the Basic Salary with effect from 01.10.2002 onwards. Therefore the powerful argument of the Banker is that the concept of Dearness Allowance ceased to be existence in the respondent bank.

5:07. It is further contended that in respect of other employees of ICICI Bank there is no component of Dearness Allowance right from its inception and there is no scheme for

payment of pension for its employees. It is stated that the alignment of compensation of salary structure was made by the respondent bank for the benefit of the employees of Bank of Madura and as agreed in the terms of the said agreement, the benefit of pension for the officers who opted for pension shall continue as per the Pension Scheme existing as on the date of the merger of Bank of Madura with ICICI Bank.

6.00 Therefore the case of the petitioner is that the pension was contemplated based on the last drawn pay together with Dearness Allowance is not correct. It is an admitted fact that at the time of revision of the compensation structure, there was an agreement to continue the existing pension scheme for the time being and there was no mutual settlement reached with reference to the pension issue. Hence pension is continued to be paid as per the existing pension scheme to the pension officers and the petitioners are granted pension, which includes basic pension and applicable Dearness Relief even though the petitioners are not entitled for the same.

6:01. The specific case of the banker is that the petitioners are being paid pension including Dearness Relief over and above what they are entitled for.

6:02. At this stage, it is relevant to note other important facts. An Early Retirement Option - 2003 was introduced in July 2003 for all its employees of the bank and it provided for payment of immediate pension to those eligible employees as per the regulations of Bank of Madura who opted for Early Retirement Option, irrespective of the fact whether they have reached the age of superannuation, as otherwise they have been eligible to receive only on reaching the age of superannuation.

6:03. It is further submitted by the respondent Bank that the modalities for payment of pension to the pensioners being that the last drawn 10 months average basic pay which includes FPA, PQA, Spl. Pay if any is taken into account and then arrived at the notional basic pay for the purpose of pension for pension basic. However, with regard to the payment of Provident Fund to the employees, the last drawn pay of the employee was taken into account as per the industry level practice.

6:04. The contention of the petitioners is that the basic pension should be worked out as per the said revised salary which does not have a component of Dearness Allowance and it should be worked out on the 10 months average emoluments last drawn by the petitioners. According to the respondent it is a fallacious argument. The reason given by the bank is that in that case the petitioners would be entitled for fixed pension calculated on the last drawn emoluments only as on the date of their respective date of retirement and they would not be eligible for Dearness Relief on such monthly fixed pension. There is considered force in this argument.

6:05. The case of the petitioners is that they made representations to the banker as they have accepted the earlier retirement option and retire from service and the bank having relieved them has a positive obligation under the pension regulation of the scheme by paying the petitioner the pension in terms of the regulation of Bank of Madura.

6:06. The reply from the banker is that after amalgamation and while amending Pension Regulations of Bank of Madura, Sub clause (v) was specifically introduced for employees who opted for pension under the said Pension Regulations and who opted for retirement under the Early Retirement Option - 2003 as enumerated in Regulation 2 (zea) and who have completed 20 years of service in the bank shall be eligible for pension from the date of retirement and the payment of pension shall commence from the very next month. It is significant to note that while amending Regulation 35 and by introducing Sub-clause (v), no corresponding amendment was made to Regulation 38. With regard to the entitlement for Dearness Relief under Regulation 38 under the Early Retirement Option - 2003 of Bank of Baroda demands the employees for opting Early Retirement Option 2003 would be entitled to receive only the basic pension. Thus the employees who had opted for retirement under the Early Retirement Option - 2003 are not entitled for Dearness Relief under Regulation 35.

7.00 The material and relevant facts which are high lighted above are sufficient to answer the two points involved in this case.

7:01 The first point is of jurisdiction and the second one is on the merits of the matters.

8.00 Maintainability:

8:01 This point is directly covered through a Judgment of Apex Court in //Federal Bank Ltd. Vs. Sagar Thomas and Others // (2003) 10 SCC 733//. Through an elaborate and detailed discussion the Apex Court has clarified whether the writ petition is maintainable against the private banker. It was held that :

"A writ petition under Article 226 of the Constitution of India may not be maintainable against (i) the State (Government); (ii) an authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging a public duty or positive obligation of a public nature; and (viii) a person or a body under a liability to discharge any function under any statute, to compel it to perform such statutory function. It is no doubt true that a mandamus can be

issued to any person or authority performing public duty, owning positive obligation to the affected party."

8:02 On consideration of number of decisions on the point, the Apex Court found the above principles which may be relevant for coming to a conclusion whether any public element is involved or not in the activities of the private body. The Apex Court also held that private companies would normally not be amenable to the writ jurisdiction under Article 226 of the Constitution. But in certain circumstances a writ may be issued to such private bodies or persons as there may be statutes which need to be complied with by all concerned including private companies. The Apex Court has also given example on such statutes, there are certain legislations like the Industrial Disputes Act , the Factories Act or for maintaining proper environment , say the Air (Prevention and Control of Pollution) Act, 1981 or the Water (Prevention and Control of Pollution) Act, 1974 etc. or statutes of the like nature which fasten certain duties and responsibilities statutorily upon such private bodies which they are bound to comply with. If they violate such a statutory provision a writ would certainly be issued for compliance with those provisions. The Apex Court also held that if a private employer dispenses with the service of its employee in violation of the provisions contained under the Industrial Disputes Act, in innumerable cases the High Court has interfered and issued a writ to private bodies and companies in that regard. But the difficulty in issuing a writ may arise where there may not be any non-compliance with or violation of any statutory provision by the private body. In that event a writ may not be issued at all. Other remedies, as may be available, may have to be resorted to.

8:03 While laying law of the land, the Apex Court also noted that merely because Reserve Bank of India lays the banking policy in the interest of the banking system or in the interest of monetary stability or sound economic growth having due regard to the interests of the depositors does not meant hat private companies carrying on the business or commercial activity of banking, discharge any public function or public duty. These are all regulatory measures applicable to those carrying on commercial activity in banking and these companies are to act according to these provisions failing which certain consequences follow. It is further stated that a private company carrying on banking business as a scheduled bank cannot be turned as an institution or a company carrying on any statutory or public duty and their obligation cannot be enforced through issuance of a writ under Article 226.

8:04 In the above case a disciplinary action has been taken against one of the employees of the Federal Bank, and the services of the employee with the Bank was terminated. The action of the bank was challenged by the respondent by filing a writ petition. The Apex Court held that the employee is not trying to enforce any statutory duty on the part of the Bank.

8:05. It is a direct decision of the Supreme Court of India with regard to maintainability of writ petition, clarifies that a writ cannot be issued where there is no non-compliance or no violation of statutory provisions by the bank.

8:06. There is no doubt with regard to the status of ICICI Bank which is a company registered under Indian Companies Act, 1956 and it is not owned by the Central or State Government. In writ petitions W.P.14176 of 1996 and W.P.5184 of 1997, this Court following the decision of the Division Bench reported in 1995 1 LLM 677 held that the respondent bank is not amenable to writ jurisdiction, while so, the decision of another Division Bench reported in 1998 1 LLM 235 held that there is no universal or general rule that no writ petition can lie against a private person or a private institution.

8:07 That aspect has been clarified by the Apex Court through a Judgement reported in Federal Bank Ltd. Vs. Sagar Thomas and Others (2003) 10 SCC 733.

9.00 PENSION :

9:01 Article 311(2) of the Constitution of India does not deal with the question of pension at all. It deals with three situations namely (i) Dismissal (ii) Removal and (iii) Reduction in rank.

9:02 The earlier view of the Supreme Court of India that the right of the employee to receive pension is property is under Article 31(1) and the employee had not power to withhold the same and the said claim is also property under Article 19(1)(f) and it is not saved by sub-article (5) of Article 19. Therefore denying the right of employee to receive pension affects the fundamental right of the petitioner under Articles 19(1)(f) and 31(1) of the constitution and the writ petition under Article 32 is maintainable

9:03 But the latest view taken by the Supreme Court of India says that pension is no more a property. No doubt pension is not a bounty and it is not depending upon the sweet will and pleasure of the employer and the employee is entitled to receive the same, similarly the employer cannot refuse the pension and cannot interfere with the pension without giving reasonable opportunity to the employee. Pension can normally be treated as a matter of right when there is no law covering but when there is a specific law and regulations the pension is to be paid to the employee but subject to the review and alteration by the employer. Therefore the employer has to properly consider the claim of the employee for payment of pension strictly in accordance with the law or the regulations. A right to receive the pension is a condition of service. Whenever an employer exercising its discretion and introducing new schemes or regulations it should be based upon good faith and due care and for the benefit of the employee.

With radical change and developing social notion and social security, pension is not ex-gratia payment but a payment for the services rendered for long and in old age, the employee should not be left in lurch and reduced to destitution and penury. Therefore the payment of pension is, therefore, a right and it does not depend upon the sweet will and discretion of the employer. The right of pension and its payment cannot be denied and the payment of pension is covered by the rules made on that behalf.

9:04 What is the qualifying service for for calculating the pension and how the pension is to be paid etc are governed by regulations. There will be revised pension rules depends upon the facts and circumstances of each case, the amount of pension to be received by the retired employee is to be decided. Therefore the concept of pension is now well known and has been clarified by the Supreme Court time and again. Pension is not a charity or bounty nor is it gratuitous payment solely dependent on the whim or sweet will of the employer and it is earned for rendering long service and is often described as deferred portion of compensation for past service.

9:05. In the instant case, the banker is not denying the payment of pension. The specific contention of the banker is that clause (v) was introduced while amending the existing pension regulations and they came into effect from 01.07.2003 and it is strictly in accordance with the amendments.

9:06. The banker is paying the pension. Similarly the employee who had opted for Early Retirement Option - 2003 are not entitled for Dearness Relief under Regulation 38.

9:07. In Union of India V. P.N. Menon AIR (1994) SC 2221, it is observed as follows:

"The scheme to merge a part of the dearness allowance for purpose of fixing the dearness allowance was evolved and was linked with the average cost of living index at 272 which fell on 30th April 1977. In this background it cannot be said that the date 30th September 1977 was picked out in an arbitrary or irrational manner, without proper application of mind. The option given to employees who retire on or after 30th September 1977 but not later than 30th April 1979 to exercise an option to get their pension and death-cum-retirement gratuity calculated by excluding the element of dearness pay as indicated in the Office Memorandum or to get it included in their pension and death-cum-retirement gratuity was not an exercise to create a class within class. The decision having a nexus with the price index level at 272, which it reached on 30th September, 1977 was just and valid."

9:08. Similarly in Union of India V. B.Rama Murthy (1995) 2 SCC 430, it is clearly held that:

"Government of India's Office Memorandum dated 25.05.1979 introduced that half of the dearness pay was treated as pay to compute retirement benefits. Earlier only 3/10th of 10 months' average pay was computed for pension under the impugned order in para (iii) of the Office memorandum dated 25.05.1979 and the computation would be 5/10th of it. In other words, the Office Memorandum is more beneficial rather than earlier computation. The Supreme Court held that the Rule is not arbitrary and there is no invidious discrimination in the classification of the pensioners who retired on different dates and in computation of the pension for different periods."

9:09. In Union of India Vs. Brig. P.K.Dutta 1995 (1) SLR 342, it is held that the:

"Pension Regulations are non-statutory in character. However in the same Judgment, it is held that the pensionary benefits are provided for and are payable only under these regulations and can, therefore, be withheld or forfeited under, and as provided by those very regulations."

9:10. Therefore it is clear that the Pension Regulations are not statutory in character.

9:11 While so in Federal Bank Ltd. Vs. Sagar Thoma and Other (2003) 10 SCC 733 it has been clearly held that writ cannot be issued where there is no non-compliance or violation of any statutory provision.

9:12. In the instant case, there is no statutory obligation on the part of the respondent banker to pay the pension as demanded by the petitioners. The banker is paying the pension as per the rules and regulations. The petitioners are demanding at a different rate.

9:13 There is no statutory obligation on the banker to pay the same as demanded by the petitioners which is not strictly as per the regulations. The reasons have already been highlighted in the preceding paragraphs. The earlier pension regulations were amended and Sub-clause (v) was introduced and while amending Regulation 35 by introducing Sub Clause (v), no corresponding amendment was made to Regulation 38 and it means the employees opted for Early Retirement Option 2003, would be entitled to receive only the basic pension and there is no statutory right on those employees who have opted for retirement under the Early Retirement Option - 2003 to claim Dearness Relief under Regulation 38.

9:14. In V.M.Gadre Vs. M.G.Diwan AIR (1996) SC 1534, Supreme Court has held that:

"The Court cannot substitute a totally new pension-plan in place of an existing one as each service and each institution has its own service conditions and merely because in another service the pension plan is better it cannot be adopted and substituted in a different service. In any service, a pension plan is only one component of the basket of service conditions for the service and it cannot be viewed in isolation and where comparison is permissible all the conditions have to be compared because in one service weightage may have been given to fixation of pension whereas in another the benefit may have been given to house rent or maximum medical expenses."

9:15. In N.Venkatramani Vs. Indian Bank and another 2005 WLR 820, a Division Bench of this Court at Para 12 observed that: the right of the employee to receive pension depends upon the interpretation of Regulation 18 vis-a-vis the amended Regulation 28, by which, the proviso came to be added with effect from 01.09.2000. It is a case dealing with broken service and the facts are not identical. However the Division Bench has clearly held that the right of the pensioner depends upon the interpretation of the regulation.

9:16. The specific plea of the respondents is that they are paying the pension to the petitioners under the Early Retirement Option - 2003 and their demand to pay pension as they like is not a statutory right conferred on them and the writ petition is not maintainable with substance and with some force. Apart from that on merits also Sri. Somayajji learned senior counsel appearing for the respondents was able to convince that the employees who have opted for Earlier Retirement Option - 2003 are entitled to receive only basic pension and are not entitled for Dearness Relief as provided under the Regulation 38 in view of the amended regulation Sub-clause (v).

10:00 Thus both on the merits as well as on the point of jurisdiction, the petitioners have no case.

11.00 For all the foregoing reasons, I find no merits in the writ petition and hence the writ petition is dismissed. No Costs.
Svki

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1.The Chairman and Managing Director,
ICICI Bank Limited
Corporate Office, ICICI Bank Tower,
Bandra Kurla Complex,
Mumbai 400 051.

2.The Personnel Manager,
HR Department,
ICICI Bank Limited,
192, Anna Salai,
Chennai - 600 002.

+ One cc to M/s. Aiyar and Dolia, Advocate sr no. 8371
+ One cc to Mr. Bala Haridas, Advocate sr no. 8051

NTK(CO)
NM(19.02.07)

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